# **United States Department of Labor Employees' Compensation Appeals Board**

LARRY A. HART, Appellant	)	
and	)	Docket No. 03-1869 Issued: March 8, 2004
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL	)	issued. March 6, 2004
CENTER, Chillicothe, OH, Employer	)	
	)	
Appearances:		Case Submitted on the Record
Larry A. Hart, pro se		

Office of Solicitor, for the Director

## **DECISION AND ORDER**

# Before:

COLLEEN DUFFY KIKO, Member DAVID S. GERSON, Alternate Member WILLIE T.C. THOMAS, Alternate Member

## **JURISDICTION**

On July 9, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated April 17, 2003 which denied his reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated June 8, 2001 and the filing of this appeal on July 9, 2003, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

# <u>ISSUE</u>

The issue on appeal is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error on April 17, 2003.

#### FACTUAL HISTORY

In this case, the Office accepted that appellant sustained a work-related injury on December 7, 1982 which resulted in acute cervical strain, cervical radiculopathy and cervical fibromyositis.

In a medical report dated April 17, 1995, appellant's treating neurologist, Dr. Gary Wise, noted that appellant was disabled from doing heavy physical activity and that he could only do light-duty work. On January 23, 1998 Dr. Gerald Steiman, the Board-certified neurologist to whom the Office referred appellant for a second opinion, opined that the conditions of acute cervical strain, cervical radiculopathy and significant cervical fibromyositis had ceased or resolved and that appellant was not disabled from performing his previous job activity of stone mason. In a supplemental report dated March 9, 1998, Dr. Steiman recommended that appellant undergo a complete psychiatric evaluation in order to evaluate his pain disorder. Accordingly, on June 7, 1998, appellant was seen by Dr. Ken Blissenbach, a Board-certified psychiatrist, who opined that, although he did not recommend that appellant return to his job of stone mason, he did believe that appellant was capable of doing sedentary work activities or light duty. On September 7, 2000 appellant was evaluated by Dr. Michael Slomka, a Board-certified orthopedic surgeon, who opined that appellant, from an orthopedic basis and related only to his neck, could do limited employment. He indicated that he should not do a great deal of overhead work or heavy lifting, specifically, no lifting over 15 to 20 pounds and no overhead work or work over the shoulder. On March 15, 2001 the employing establishment offered appellant a position as a program clerk which was within the restrictions noted by Dr. Slomka. He refused this position and, after proper notification, by decision dated June 8, 2001, the Office terminated appellant's compensation benefits as it determined that appellant had refused suitable employment under 5 U.S.C. § 8106(c). The Office noted that appellant's claim remained open for medical treatment.

By letter dated July 27, 2001, but not received by the Office until November 21, 2002, appellant requested reconsideration. In support thereof, appellant submitted a form by Dr. Maxwell G. Carroll, an internist, dated July 23, 2001, wherein he indicated that "due to [a] nervous condition and neck disability [appellant] cannot work for [eight] hours." In fact, Dr. Carroll noted that appellant was totally disabled. Appellant also submitted notes indicating that he received treatment by Dr. Carroll on January 2, February 11 and April 2, 2003.

By decision dated April 17, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to establish clear evidence of error.

## **LEGAL PRECEDENT**

The imposition of a one-year time limitation within which to file an application for review as part of the requirements for obtaining a merit review does not constitute an abuse of

discretionary authority granted the Office under section 8128(a). This section does not mandate that the Office review a final decision simply upon request by a claimant.

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). Thus section 10.607(a) of the implementing regulations provides that an application for reconsideration must be sent within one year of the date of the Office merit decision for which review is sought.<sup>2</sup>

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.<sup>3</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by the Office.<sup>4</sup> This evidence must be positive, precise and explicit and must manifested on its face that the Office committed an error. Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>5</sup>

It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. Thus, evidence such as a well-rationalized medical report that, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and does not require merit review of a case.<sup>6</sup>

To show clear evidence of error, the evidence submitted must be not only of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but also be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>7</sup>

This entails a limited review by the Office of how the evidence submitted with the reconsideration bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>8</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the

<sup>&</sup>lt;sup>1</sup> Diane Matchem, 48 ECAB 532 (1997), citing Leon D. Faidley, Jr., 41 ECAB 104 (1989).

<sup>&</sup>lt;sup>2</sup> 20 C.F.R. § 10.607(a).

<sup>&</sup>lt;sup>3</sup> *Id*.

<sup>&</sup>lt;sup>4</sup> Nancy Marcano, 50 ECAB 110 (1998).

<sup>&</sup>lt;sup>5</sup> Richard L. Rhodes, 50 ECAB 259 (1999).

<sup>&</sup>lt;sup>6</sup> Annie Billingsley, 50 ECAB 210 (1998).

<sup>&</sup>lt;sup>7</sup> Veletta C. Coleman, 48 ECAB 367 (1997).

<sup>&</sup>lt;sup>8</sup> Jimmy L. Day, 48 ECAB 654 (1997).

Office such that the Office abused its discretion in denying a merit review in the face of such evidence.<sup>9</sup>

#### <u>ANALYSIS</u>

In this case, the last decision on the merits, *i.e.*, the Office's decision terminating compensation benefits, was issued on June 8, 2001. Appellant's letter requesting reconsideration was dated July 27, 2001. However, there is no indication that appellant's letter was received by the Office until November 21, 2002. Although appellant contends that his request for reconsideration was timely filed, he has submitted no further proof, such as a certified mail return receipt, certificate of service or affidavit, in support thereof. Accordingly, the Board finds that appellant did not file a timely request for reconsideration. Appellant must therefore establish clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.

The only medical evidence appellant submitted with his request for reconsideration were notes indicating that appellant had seen Dr. Carroll in 2003 and a form wherein Dr. Carroll indicated that appellant was totally disabled due to his nervous condition and neck disability on July 23, 2001. Dr. Carroll provided no reasoning for his conclusion, nor is his conclusion supported by any objective testing. His unsupported statement is not sufficient to establish clear evidence of error. Appellant presented no other evidence or legal argument showing any error in the Office's June 8, 2001 decision. Therefore, the Office did not err when it found appellant's petition for reconsideration was untimely filed and failed to establish clear evidence of error.

## **CONCLUSION**

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review on April 17, 2003. The Board further finds that appellant failed to submit evidence establishing clear error on the part of the Office in his reconsideration request. Inasmuch as appellant's reconsideration requests were untimely filed and failed to establish clear evidence of error, the Office properly denied further review on April 17, 2003.

<sup>&</sup>lt;sup>9</sup> Thankamma Mathews, 44 ECAB 765 (1993).

<sup>&</sup>lt;sup>10</sup> See 20 C.F.R. § 10.607(a).

# **ORDER**

**IT IS HEREBY ORDERED THAT** the April 17, 2003 decision of the Office of Workers' Compensation Programs is affirmed.<sup>11</sup>

Issued: March 8, 2004 Washington, DC

> Colleen Duffy Kiko Member

David S. Gerson Alternate Member

Willie T.C. Thomas Alternate Member

<sup>&</sup>lt;sup>11</sup> The Board notes that appellant has not appealed the October 8, 2002 decision finding an overpayment in the amount of \$11,990.00. Accordingly, the Board has not addressed this issue on appeal.